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No. 151

FILED
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HAROLD B. WILLEY, Cl

IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

EVA SIMPSON, BETTY BURRELL and GRACE PROUDFOOT, Individually and as Taxpayers of the City of Los Angeles, and on behalf of all other taxpayers of the City of Los Angeles, and FRANCES STANCLIFF,

Plaintiffs and Appellants,

vs.

CITY OF LOS ANGELES, a Municipal Corporation, GEORGE M. UHL, RICHARD L. BONNER, JOHN DOE 1, DOE II, DOE III, DOE IV and DOE V,

Defendants and Respondents,

and

MEDICAL RESEARCH ASSOCIATION OF CALIFORNIA, a Corporation, CEDARS OF LEBANON HOSPITAL, a corporation, HARRY GOLDBLATT, M.D., COLLEGE OF MEDICAL EVANGELISTS, a non-profit corporation, and UNIVERSITY OF SOUTHERN CALIFORNIA, a non-profit corporation,

Interveners and Respondents.

PETITION FOR REHEARING

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PETITION FOR REHEARING

COMES NOW the appellants and petition for a rehearing of the order of this court of October 12th dismissing the appeal "for want of a substantial federal question."

We respectfully wish to point out that this court has apparently overlooked certain facts which are *substantial* in this case and on which we respectfully base our petition for rehearing on the ground that the questions presented are substantial and affect dog owners throughout the nation. The Act of Congress authorizing a review on appeal from a judgment of a state court upholding the Constitutionality of a statute gives appellants a *right* of appeal as distinguished from *discretion* authorized by a petition for a writ of certiorari.

It is important that a hearing be granted in this case to determine the following substantial questions:

1. Does the Act of Congress Title 28, Section 1257, Subdivision 2 entitle an appellant to an appeal as a matter of *right* where it is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity?

2. Where a state statute or city ordinance as construed by the highest court of the state to be valid provides a very short period of time so short within which notice may be given to those affected by the ordinance in the taking and confiscation of private property, to-wit—does it deprive the owner of the dog of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

3. Is a city ordinance which allows private medical laboratories located only in the city to appropriate dogs

in the city pound after they have been picked up as strays and kept there only five (5) days and permits the use of them for medical experimentation deny to all owners of dogs and to other persons and hospitals in the state and county the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States?

The ordinance here involved, while coming from the City of Los Angeles, is being watched by dog societies all over the country and by persons who are dog lovers as to its possible effect on legislation that is bound to be enacted and patterned after the Los Angeles City ordinance. We respectfully submit that the questions presented are therefore substantial in their nationwide effect, and that our appeal should be heard.

This Court has said in *Angel v. Bullington,* 330 U. S. 183, 189, 91 L. Ed. 837:

> "Bullington could have come here, *not merely by the grace of this Court on certiorari,* but on appeal, as did White in *White v. Hart,* 13 Wall. (U. S.) 646, 20 L. Ed. 685, supra, to challenge, successfully, the right of Georgia to limit the jurisdiction of the Georgia courts; as did the East New York Savings Bank in the recent case of *East New York Sav. Bank v. Hahn,* 326 U. S. 230, 90 L. ed. 34, 66 S. Ct. 69, 160 A. L. R. 1279, to challenge, though unsuccessfully, the limitation which New York placed upon the jurisdiction of its courts. *Cf. Kenney v. Supreme Lodge,* L. O. 252 U. S. 411, 64 L. ed. 638, 641, 40 S. Ct. 371, 10 A. L. R. 716 . . . "

We submit that the statute gave us the *right* on appeal to come to this court to determine the validity of the Los Angeles City ordinance by an appeal.

Justice Douglas allowed an appeal in this court after an examination of the papers in the case.

This case involves in approximate figures the rights of 152,000 owners of licensed dogs in the City of Los Angeles (Resp. Br., 9) who pay taxes and license fees on these dogs in the approximate sum of nearly one-half million dollars per year for the care, protection and shelter of their dogs in a humane manner.

It also involves the right of taxpayers of the City to the funds from the sale of dogs at its pounds and the payment thereafter for the benefit when sold.

Certain dogs do not have to be licensed, such as Seeing-eye that lead the blind, dogs under four months of age, Kennel dogs and dogs that may be kept on farms and are just brought into the city by their owners on a visit, etc. Their owners have a constitutional and statutory right to be protected in their ownership of property, Article 1, Section 1 Constitution of California. Certain statutes and constitutional provisions are involved in this case, and we are in accord with the request of the City of Los Angeles that "If perchance it (the ordinance) may be invalid the Appellate Court should say so now, and this question may only be determined now upon a hearing in this court." (Resp. Br. 10). We therefore make the same request.

The following constitutional provisions are involved:

Constitution of California, Article I, Section 1:

"All men are . . . and have certain inalienable rights, among which are those of . . . acquiring, *possessing,* and *protecting* property; and obtaining safety and happiness."

The Fourteenth Amendment to the Constitution of the United States:

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or *property, without due process of law;* nor deny to any person within its jurisdiction the *equal protection of the laws.*"

AN ORDINANCE ADDING SUBSECTION (h) TO SECTION 53.11 OF THE LOS ANGELES MUNICIPAL CODE RELATING TO THE REGULATION OF THE SURRENDER OF UNCLAIMED IMPOUNDED ANIMALS FOR PURPOSES OF *MEDICAL RESEARCH.*

The People of the City of Los Angeles Do Ordain As Follows:

Section 1. Subsection (h) is hereby added to Section 53.11 of the Los Angeles Municipal Code, to read:

(h) Whenever any reputable *institutions of learning, hospitals, research laboratories* or their *allied institutes* in the City of Los Angeles shall make application to the Health Officer of the City of Los Angeles for permission to use *humanely*

unclaimed impounded animals for the good of mankind and the increase of knowledge relating to the cause, prevention, control and cure of disease, the Health Officer, on being satisfied that the said animals are to be so used, shall, from time to time, certify to the Department of Animal Regulation the names and addresses of said institutions of learning, hospitals, *research laboratories* and their *allied institutes* which he is satisfied will use animals humanely for the purposes above specified.

It shall be the duty of the Department of Animal Regulation to surrender unclaimed impounded animals for such uses only when applied for by institutions of learning, hospitals, research laboratories and their allied institutes which have been certified by the Health Officer as herein provided. No animal shall be surrendered except as authorized by law.

In order to give the owners of impounded animals time within which to reclaim the same, no animal shall be surrendered for such uses until it has been impounded for a period of at least five days.

No animal shall be surrendered for medical research, the owner of which has turned over such animal to the Department of Animal Regulation for destruction. Any such request for destruction of an animal by the owner thereof shall be complied with by the Department.

The Department of Animal Regulation shall adopt and enforce rules and regulations providing for the care of animals so surrendered comparable to *Supplement 211 Public Health Reports, 1949,*

Federal Agency, entitled "Care of the Dog Used In Medical Research."

Section 53.11(h) is void on its face for the following reasons:

1. Section 53.11(h) violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States in that it fails to provide *notice* and an opportunity to be heard by the owners of seized dogs in the City of Los Angeles—whether licensed or unlicensed, before forfeiture or confiscation.

2. Section 53.11(h) is unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, Section 13, of the Constitution of California in that it provides an inadequate *time* or *method* for furnishing notice to owners of seized dogs and provides for the confiscation of private property without notice and without an opportunity to be heard adequately.

3. Section 53.11(h) is unconstitutional on its face in that it provides for the seizing of private property for a *private* use in violation of Article I, Section 14 of the Constitution of California.

4. Section 53.11(h) is unconstitutional in that it is special, partial and arbitrary legislation and denies the equal protections of the laws in permitting the giving away of dogs to *institutions of learning, hospitals, hospitals' research laboratories,* or their allied institutes in

the *City of Los Angeles* only and does not permit the same rights, privileges and opportunities to pet societies, dog loving organizations, governmental agencies, institutions for the blind, dog breeders, childrens' home or institutions either inside or *outside* of the City of Los Angeles or any medical institutions outside the city, and thus denies the equal protections of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 13, of the Constitution of California, and Articles I, Sections 11 and 25 of the Constitution of California, and is special legislation violative of the foregoing sections. Under it even the University of California being outside the City of Los Angeles is barred.

5. The ordinance conflicts with State Law, Sections 597 and 599(c) of the Penal Code, and Section 384 General Laws (Deering's Code), which now cover the entire field. Section 599(c) now permits the regularly authorized faculty of a Medical University to conduct experiments and is statewide; the ordinance expands this provision and limits all its provisions to the city of Los Angeles. Thus even U.C.L.A. at Westwood, outside the City would be barred.

6. The ordinance on its face gives unlimited discretion to a local Administrator to confiscate and give away private property and give it away for a private use.

I.

THE ORDINANCE FAILS TO GIVE NOTICE AND AN OPPORTUNITY TO BE HEARD AND IS THEREFORE VOID ON ITS FACE.

Section 53.11(h), carefully analyzed, shows that it is void on its face for lack of notice, the first essential of due process of law. (*H. Moffat Co. v. Hecke,* 68 Cal. App. 35.) The Section provides for *no notice* of any kind or character, to appear in person or by publication before disposing of impounded animals. It in effect permits the city to forfeit or confiscate and then to give away the dog to a private institution after it has been impounded for a period of only five days, *without any notice either actual or constructive* of any kind or character to the owner. Such a statute is void as violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 13, of the Constitution of the State of California.

In *H. Moffat Co. v. Hecke,* 68 Cal. App. 35, 228 Pac. 546, it was held that the Cattle Protection Act, Stats. 1917, ch. 678 and the portion of the Statutes of 1919, creating the Department of Agriculture and providing that the directors of that department should succeed to and be vested with all of the powers and duties, responsibilities and jurisdiction of the Cattle Inspection Board (Stats. 1919, ch. 325) which provides that:

> "If upon such inspection cattle shall be found not belonging to the shipper all such cattle shall be *taken* by the inspector and dealt with in accordance with the rules of the board in such case made,"

but which makes no provision for notice, either actual or constructive, to the owner of the action to be had, contravenes the due process clause of the Federal Constitution and are therefore void.

A statute which fails to provide notice before property is taken or forfeited violates due process of law.

> *People v. Grant*, 52 Cal. App. (2) 794;
> *People v. Broad*, 216 Cal. 1, 12 Pac. (2d) 941.

The notice must be to someone.

> *Davis v. Heinbach*, 75 Cal. 261.

Where a statute does not provide for a notice, even the voluntary giving of notice does not remedy the defect in the act.

> *H. Moffat Co. v. Hecke*, 68 Cal. App. 35, 228 Pac. 546.

Where a license or permit is required, a fair notice is required before it can be revoked.

> *Ervine v. St. Board of Equalization*, 40 Cal. App. 2d 280.

And see: *Fucelli v. American Society*, 23 N. Y. State (2d) 983. This was a dog case.

Not only must there be notice and an opportunity to be heard, but it is an undisputable proposition that a notice which is too *short* to be reasonable and adequate for the purpose does not constitute due process of law.

Roller v. Holly, 176 U. S. 402;
Marx v. Ebner, 180 U. S. 314;
Roberts v. Jacobs, 154 Cal. 307.

It is doubtful if other Sections 53.11 Municipal Code could have any application as they refer only to stray dogs that may be sold, not those to be *given* away for purposes set out in 53.11(h).

See 53.11:

"(b) In the case of dogs, the humane department shall hold such animal for a period of one (1) day after the impounding of such animal, during which time the owner of said animal, if known, shall be notified, after which time said animal may be *sold* by an officer of the department in the same manner as provided in this section for the *sale* of other animals, except that *notice of sale* be posted only two (2) days in the places named in this section."

The places mentioned in the section are, the bulletin board of three public buildings, namely (1) at the public pound; (1) at the city hall, and (1) at the central police station.

And such notice under Section 53.11 is entirely too short and the places set out too insufficient to be *rea-*

sonable and *adequate*. One day's time is not even sufficient for a post card to reach an owner. At present day deliveries, even in the city, it generally takes *two* days for ordinary mail to reach a person. There are numerous places in the City of Los Angeles where dogs are taken when found, besides one of the five scattered pounds. There are 5 pounds in the Los Angeles area and several other places where dogs may be taken by the city. The pound is only one of them. If a person is a working person, who owns a dog, and the dog has gotten away while the owner is away it is absolutely impossible, even with diligent search, to find a dog within this short period of time.

We, therefore, challenge the constitutionality of Section 53.11(h), the ordinance which was passed by initiative, and also 53.11, particularly paragraph (b) as entirely inadequate to constitute sufficient or adequate notice to afford due process of law under the Fourteenth Amendment to the Constitution of the United States and Article I, Section 13, of the Constitution of California.

The ordinance authorizes a health officer to give away dogs, whether *licensed* or *unlicensed*, which have not been reclaimed within *five* days *only* to institutions in the *City* of Los Angeles and *only* to those institutions of learning, hospitals, research laboratories, or allied institutes, and only such as have been certified by the health officer. Such a statute is discriminatory and denies the equal protection of the laws, and lacks

uniformity of operation. Guaranteed by the Fourteenth Amendment to the U. S. Constitution. It grants special privileges to a class, and only to a class in the *City* of Los Angeles. The dogs in question could not be given to the University of California at Berkeley, nor to Stanford University at Palo Alto or its medical college in San Francisco; nor to the California Institute of Technology; nor to the Memorial Hospital at Pasadena, which is probably the leading research institute on certain types of cancers. The Veterans Hospital at Sawtelle would also be barred but any private laboratory, chiropractic college, or other institution satisfying the city health officer would be eligible to receive the dogs for nothing.

The Los Angeles City ordinance permits only five days under any construction of the city statutes within which to locate one's dog that got lost, strayed or otherwise was found on the streets without his license tag on him. It makes the city dog catcher an advance agent to seize private pets and that have lost their identification and turn them down for masterless experimentation without compensation to the owner. It permits seizure and confiscation of private property without compensation. Considering the geographical size of the City of Los Angeles and the fact that it has various pounds scattered in that geographical area and these pounds are only open during the working hours of the day, a person's most beloved pet could be lost, without adequately adequate notice or opportunity to find it. This court has repeatedly held that shortness of notice

and fair opportunity to reacquire one's property is a denial of due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States. Under California state law dogs are property and the subject of theft.

In *Powell v. Alabama,* 237 U. S. 45; 77 L. Ed. 158 the court pointed out that notice and an opportunity to defend are of the very essence of due process of law. This court has repeatedly held that notice and opportunity to be heard are of the very essence of due process of law.

Roller v. Holly, 176 U. S. 398, 402;
Marx v. Ebner, 180 U. S. 314;
Roberts v. Jacobs, 154 Cal. 307.

The ordinance also deprives citizens of the equal protection of the law in that it does not give dog lovers and the citizens throughout the city the same rights as medical laboratories located within the city itself. It gives medical laboratories for experimentation and vivisection in the city the right to come in and pick these dogs up immediately. But dog lovers are denied that same right; also other societies are denied that same right although they may be equally interested in acquiring the dogs and preserving the dogs' lives rather than using them for experimentation. We submit that each of these issued are substantial and that a petition for rehearing should be granted.

We pray for rehearing and reversal of the judgment below which sustained the constitutionality of the ordinance under the Fourteenth Amendment.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellants.

CERTIFICATE OF COUNSEL

I, MORRIS LAVINE, attorney for the appellants, hereby certify that the petition for rehearing is filed in good faith and not for the purposes of delay and is based upon grounds that the questions are substantial and that developed as a result of the dismissal of the appeal "for want of a substantial question."

MORRIS LAVINE,
Attorney for Appellants.